United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

187

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,655

GEORGE W. GOULD, JR.,

Appellant,

v.

A B C DEMOLITION CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED*

In the opinion of the plaintiff-appellant, the following are presented by the appeal.

1. Was the plaintiff prejudiced and denied his appropriate rights by the District Court's allowance during cross-examination of defendant's counsel's declarative statements that the plaintiff had

*This case has not previously been heard by this Court.

been arrested, had beaten his wife and had been hospitalized to determine if he was of sound mind?

2. Was the conduct of defendant's counsel on cross-examination of the plaintiff so replete with improper questions and gratuitous statements as to create a totally distorted pattern prejudicial to the plaintiff requiring a new trial on the issue of damages?

3. Was it wholly improper and prejudicial to permit introduction by the defendant's counsel of testimony from plaintiff's former wife of domestic quarrels, plaintiff's emotional outbursts and plaintiff's arrest upon her accusation when none of the testimony was relevant to any issue in the case?

4. When, after jury had begun its deliberation, the Court received a communication from the foreman asking, "We would like to have the part of the charge that tells us what we are to decide on." Thereafter, following a brief explanation by the Court the foreman stated, "the elements of proof. What do we have to prove for the plaintiff?" To this the Court responded in a ten line instruction on the liability issue only before instructing the jury to retire and resume their deliberations.

Did such expressed uncertainty by the jury foreman require more than the brief response of the Court to the prejudice of the plaintiff?

STATEMENT OF THE CASE

Plaintiff's action sought damages for personal injuries, claiming that negligence of the defendant, ABC Demolition Corporation, while in the process of razing the Raleigh Hotel proximately caused him to be struck by flying debris, hospitalized with a head injury resulting in residual head injury and an abnormal electro-encephalo-

graph. His claim for damages resulted in a verdict in the amount of $1,627.10. Plaintiff made a motion for a new trial which was denied. This appeal of the plaintiff follows.

STATEMENT OF FACTS

On May 4, 1964 at 12th and Pennsylvania Avenue, N.W., Washington, D. C., plaintiff was struck by a board 2 feet by 6 feet under the control and responsibility of the ABC Demolition Corporation which was in the process of demolishing the Raleigh Hotel. Thereafter, the plaintiff was hospitalized, having been rendered unconscious by the blow to the head and remained in Casualty Hospital from May 4, 1964 to May 28, 1964. (App. 29-31)

The plaintiff testified that after his release, he suffered from recurring headaches several times a week from the same general type he had in the hospital—a sharp, stabbing pain in the middle of the head—and another type of headache which included a throbbing pounding headache over the top of the head. In addition, he described the presence of dizziness and nausea. (App. 32). Plaintiff described that he remained at home for a period of 3 weeks prior to returning to work during which he had two spells of vertigo. He stated that on one occasion while seated, he had the feeling that the chair he was sitting in began to float and move. He had a feeling that he was disoriented from his surroundings and he began to get dizzy and suffered nausea (App.36). He described a similar spell when he was trying to get in his car one day stating that he had a feeling as if his whole body had shifted. He grabbed onto the door of the car, had chills and a cold clammy feeling. He indicated that he never had a headache, head injury, convulsive disorder, or migraine headache prior to the accident. (App. 37).

He returned to work on what he described as a part-time basis, had the same complaints as he had while convalescing during three

weeks at home and was not able to regain the stamina that it took to carry on his job for several months and that as a result lost time totalling 750 hours at a cost of $2,500.00. (App. 41)

Thereafter, there was testimony by plaintiff's physicians that he had at the time of trial, an abnormal EEG and that plaintiff, in order to control traumatically caused epilepsy was on a prescription of dilantin and other medicine. There was medical testimony by the defendant's physician that the abnormal EEG reading was not necessarily caused by the blow to the head and without a pre-trauma EEG reading, it could not be shown that the abnormal reading for the plaintiff was abnormal for him or caused by the accident.

Following the direct examination of the Plaintiff, he was subjected to a lengthy and intense cross-examination. Defendant's counsel made numerous declaratory statements, assumed facts not at the time in evidence and never to be put in evidence. As held in *Aetna Life Ins. Co. v. McAdoo*, 106 F.2d 618 C.C.A. Ark. (1939) a question based upon evidence not admitted under the record is properly excluded. Further, Defendant's counsel introduced evidence of the Plaintiff's arrest and 40-day stay in a Virginia state asylum for mental observation, which resulted in Plaintiff being found of sound mind subsequent to which he was not convicted of any criminal offense. In the cross-examination Defendant's counsel introduced evidence of emotional upsets by the plaintiff which he, Defendant's counsel, in a declaratory statement during supposed cross-examination, likened to epilepsy. Also, Defendant's counsel read hospital records and his own physician's medical report into the record without determining whether any of the information concerning the plaintiff had been statements or admissions of the plaintiff himself or information secured from some other source. Following plaintiff's case the defendant, in the cause of the presentation called the plaintiff's former wife to describe again marital dif-

ficulties, plaintiff's arrest and hospital stay occurring prior to the accident.

Thereafter the jury awarded the plaintiff $1,627.10.

SUMMARY OF THE ARGUMENT

I. The interrogation on cross-examination of the plaintiff, George W. Gould, Jr., by defendant's counsel included a categorical inclusion of almost every objectionable and prejudicial method of interrogation to the great prejudice of the plaintiff. Plaintiff was asked questions which assumed facts not yet in evidence and questions which were loaded or contained information of a prejudicial nature rendering them incapable of appropriate answer. Defendant introduced hearsay evidence from medical records not yet in evidence and introduced evidence from medical records which constituted opinion requiring the presence of the person who rendered such an opinion and not the record itself. Defendant made numerous declaratory statements rather than questions, constituting unfair argument to which the plaintiff could comment but not appropriately respond. Cross-examination was pursued on immaterial facts and entirely collateral matters. There was introduction, by way of comment and question, of plaintiff's arrest for a crime for which he was not convicted and introduction of a marital dispute in which there was an accusation of wife-beating but no sustained conviction. There were unfair insinuations made upon the conduct of the witness and comments upon his testimony. All of these actions in the course of the cross-examination were grossly prejudicial to the plaintiff in that the damages awarded were wholly inadequate.

As stated in Jones on Evidence, Section 930, page 1748, "counsel have no right to inject into cross-examination unfair insinuations upon the conduct of the witness or comments upon his testimony. Further, the court should not wait for objections before

suppressing such conduct." As stated in Wigmore on Evidence, Third Edition, Volume 3, Section 780, it is improper to offer evidence on cross-examination.

II. The plaintiff was legally prejudiced by the permission of testimony from the former wife of the plaintiff concerning matters which were wholly irrelevant to any issue in the case. Defendant introduced evidence of plaintiff's arrest, his hospitalization for mental observation and information from a lay witness which in no way related his post-accident abnormal EEG reading to the heated marital disputes resulting in divorce.

III. The District Court, after manifestation by the foreman of the jury, following initial instructions from the Court at the close of the case of a serious inability to proceed, failed to give an adequate explanation in confining his reinstructions to the most brief comments. Upon the second inquiry from the foreman . . . asking "what do we have to prove for the plaintiff" the Court sketched the briefest outline of the requirements of liability, without mention of the damage aspects. In a trial which was protracted because the court, for reasons of health, frequently sat for only half a day, such explanation, without opportunity for the plaintiff to request a fuller explanation, was prejudicial.

ARGUMENT

I. The defendant's cross-examination of the plaintiff, violated numerous rules of evidentiary procedure with great and irreparable harm to the plaintiff so clearly prejudicial that a new trial is required. On the very first page of cross-examination, the cross-examination began with the interrogation on a fact wholly immate-

rial to any issue in the case (App. 43).[1] Plaintiff answered that he and his co-worker, Paul Kugler, on the day when the debris fell from the defendant ABC Demolition Corporation's project, demolishing the Raleigh Hotel, were going first to a camera store on 14th Street and then to grab a bite to eat on the way back to work from there. Cross-examination brought out by reference to the Plaintiff's deposition.

> Q. Where had you been and where were you going?
>
> A. I had been up into the downtown section for lunch and was going back to the Department of Agriculture.

The cross-examination at trial on this wholly immaterial fact asked,

> "Did you give the answer to that question at that time?"
>
> A. Yes.
>
> Q. Did you say anything about a camera shop at that time?
>
> A. I suppose not if that is what is there.

Following this inquiry into the immaterial fact, defendant's cross-examination (App. 48) continued.

> Q. Did you ever see these hospital records at Casualty Hospital?
>
> A. Yes.

---

[1] Material means to have probative weight that is reasonably likely to influence tribunal in making determination required to be made. *Weinstock v. U.S.*, 231 F.2d 699, 97 App. D.C. 365.

At this point, beginning his question with a conjunction so that it could blend into the prior innocuous question defendant's counsel brought into evidence, through his question, that which had not been previously admitted.[2] In addition the hospital record, on its surface, appears to be the record of someone who has obtained his information from another source and thus not a present admission by a party. The interrogation was:

> Q. And the recording report has the notation, "He claimed to have passed out." Did you make that statement to anybody? "He claimed to have passed out"?

The answer of the plaintiff indicated that he did not remember these events.

> A. I claimed to have passed out? No, I don't remember speaking to anyone. My brother was the first person I can remember talking to me. (App. 49)

The cross-examination which continued improperly introduced the hospital record for two reasons: (1) The record had not been introduced into evidence and (2) was not a shop book entry of a recordable fact but an opinion requiring the testimony of an individual,[3] *Taylor v. N.Y. Life,* 79 App. D.C. 66.

This series continued:

> Q. "Do you remember anyone taking your blood pressure on that day?"
>
> A. No I do not.

---

[2]As held in *Aetna Life Ins. Co. v. McAdoo,* 106 F.2d 618, C.C.A. Ark. (1939), a question based upon evidence not admitted under the record as it stood at the time is properly excluded.

[3]See footnote 2, supra.

Q. You do not remember anything about an examination by the doctor?

A. No I do not.

Q. And a notation was put on for that particular day, "conscious and coherent"? [At this point, Mr. Bartholomew Coyne asked where the quote was coming from and was told by Mr. Doherty that it was coming from the hospital record. Any objection was foreclosed by the court's terse order to proceed.]

"The Court: You can cross-examine." (App. 49)

Again in this same series of questions (App. 50), the same improper introduction of the hospital record and opinion was made.

Q. You do remember saying that you were knocked out for an uncertain time. You do remember saying something about being knocked out for a certain time?

A. At that time?

Q. When did you make that statement if you made it at all?

A. I don't remember making a statement. I have talked to Dr. Fea during the time I was in the hospital.

Q. This record shows that you at that time, at 2 o'clock p.m., you were conscious, oriented in time and space and there was no amnesia.

MR. COYNE: I object to that.

THE COURT: Overruled.

Clearly it was prejudicial to the plaintiff and contrary to the *Taylor v. New York Life Ins. Co.*, 79 App. D.C., page 66, and other cases to introduce opinion or diagnosis. The last statement of counsel was not a question, but a declaratory statement which

usurped the function of the jury, was on a material fact, did not specify or designate where it appeared in the record, if at all, permitted no response by the plaintiff and in fact received none. By reading, with the Court's favorable ruling, a brief summary of hospital record, the defendant's counsel attempted to dignify his position as if substantiated in the record. Clearly, this series was an attempt to confuse both the witness, the Court and the jury into thinking that the apparent consciousness of plaintiff foreclosed the possibility of a blackout or plaintiff's later inability to recall. The reference to the opinions recorded in the hospital record and the defendant's counsel's gratuitous declaratory statements which may or may not have been from the record fairly contributed to the confusion prejudicially damaging the plaintiff's credibility and materially affecting a jury's assessment of damages.

At App. 53 and 54 cross-examination was comprised in part of questions introducing information in a declarative way but insinuating an awareness of the truth of the information, thereby introducing evidence known not to be true, in contravention of Wigmore, Vol. III, Section 780:

> Q. You had a lot of trouble with your eyes before you got those glasses?
>
> A. No, not a lot of trouble. I am nearsighted.
>
> Q. Didn't you have a way of looking at things with your head cocked?
>
> Q. When you first got glasses in Houston, didn't they have difficulty down there checking your eyes?

In this series of questions (App. 53, 54), counsel introduced, as if true, phrasing to indicate that plaintiff had a lot of trouble with his eyes, held his head in a peculiar way, suggestive of one prone to have a predilection for odd and unusual poses and lastly that the plaintiff was of such an unusual and peculiar nature that by lack of

cooperation because of a physical disability that an ordinary eye examination could not be effected. Although no affirmative answer was received to any one of these questions propounded by defendant, they brought before the jury information which taken together with the other gross violations of the rules of evidence caused prejudice to the plaintiff.[4]

At pages (GC-18-20), defendant's counsel, purportedly in cross-examination, continued to read from the hospital record not yet admitted into evidence, frequently making statements rather than forming a question.

This was an inappropriate misuse of the hospital record not only because of several instances in which the record was read without addressing a question but in addition, statements contained in questions brought to the jury, for consideration, information from the mouth of the defendant's counsel not under oath and not capable of cross-examination. As stated at App. 59, there was also rhetorical ridicule.

> Q. On this notation, no complaints, that doesn't mean you were complaining about headaches, does it?

Thereafter defense counsel continued to read the hospital record.

> Q. On the 21st of May, "no complaints". On the 22nd of May, "no complaints" and you were up and around at that time? . . .

---

[4]Jones on Evidence, Section 930, p. 1748. Counsel have no right to unfair insinuation upon the conduct of the witness . . . The Court should not wait for objections before suppressing such conduct.

Further, at App. 60

> Q. 24th of May, no complaints. 25th of May, good. no complaints. 26th of May, no complaints. Did you have any complaints during that time, even about headaches?

All of this testimony from the mouth of defendant's counsel concerning the existence of complaints or lack of complaints forecloses the possibility of cross-examination. We don't know whether there was a specific interrogation by some member of the hospital staff or whether the suffering plaintiff did not specifically tell the nurses who entered their own accounts, not necessarily the true condition. This points up the inherent danger of permitting the use of records which are not of a homogenous nature but of varying degrees of admissibility unlike some business entry records which will show a specific transaction or a specific figure which either exists or does not exist. *Taylor v. N.Y. Life* recognizes this reason for caution. Supra.

At page App. 69 there is a grossly prejudicial insinuation.

> Q. Would you say that Dr. Murphy recommended that you see Dr. Mayle, would you say that Dr. Murphy is the one that recommended Dr. Mayle to you?
>
> A. No, I would say that the odds are against it, the way I recollect.

And then the clear accusation without basis in evidence that the plaintiff's attorney was manipulating every act of the plaintiff. (App. 69)

> Q. Isn't it a fact that your counsel, from the time you were in his counsel, advised you as to what to do so far as doctors and *everything* is concerned?
>
> MR. COYNE: I object to that.

THE COURT: Overruled.

This is wholly improper insinuation as to the conduct of the witness and his counsel. Like many other questions and comments throughout the cross-examination this was the type of insinuation referred to in Jones on Evidence, Section 930 at page 1748.

> Counsel have no right to inject into cross-examination unfair insinuations upon the conduct of the witness or comments upon his testimony. The court should not wait for objections before suppressing such conduct.

The objection was present in this case but absent in some others, equally damaging or more so.

Mr. Cornelius Doherty, defendant's counsel, thereafter placed before the court and jury a medical report of a physician who was not present and could not be examined or cross-examined.[5] After loading the comment ostensibly addressed at the witness, a question is asked by defendant's counsel which may cloud the fact that evidence has been submitted by counsel himself unsworn using an unsworn report not capable of cross-examination.

> Q. There is a notation in this report which is taken about the 3rd of August, the date of the report. Mr. Gould was seen 7-23-64 at the request of Dr. Briggs. Do you know who Dr. Briggs is?
>
> A. I don't think I have ever been to Dr. Briggs. . .
>
> Q. Then again he saw you September 15, 1964?
>
> A. I was going to him about every two or three months. Dr. Mayle is the one you are speaking of?

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[5]The clearest case of hearsay is where a witness testifies to the declarations of another for purpose of proving facts asserted by another. *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140, 53 A.L.R.2d 1234.

Q. He said at that time you were doing very well. Have you seen these?

This was another example of comment by Mr. Doherty constituting classic hearsay as the words of the interrogator enter the minds of the jury as evidence.[6] The fact that in the same paragraph Mr. Doherty asked Mr. Gould, Have you seen these (referring to the medical reports), diverted attention but did not cure the prejudicial damage which had been done. This statement, "He said you are doing very well" like others, was defendant's interpretation, out of context and impossible for the witness to answer, and, of course, incapable itself of cross-examination.

At App. 73 begins the immediate prelude of a grossly prejudicial interrogation of the plaintiff. The defendant brought into the trial the relationship between Mr. Gould and his former wife during a marriage which ended in divorce.

> Q. Was he (the doctor) asking you about any emotional problems? Was he giving you dilantin,—something about an abnormal EEG and so thought that you might have seizure of some type? Did he ask you about any history prior to May 4, 1964 about such a condition as that? Didn't he ask you something about it, whether you have emotional problems, a nervous condition or something like that prior to the time he saw you?
>
> A. Yes, I believe he did.
>
> MR. COYNE: I object to that.
>
> THE COURT: Overruled. You remember what you told him if you told him anything?

---

[6] Hearsay also is defined as statement made without the sanction of oath and without declarant being under a responsibility for perjury in making willful falsification. *Donnelly v. United States*, 228 U.S. 243, 57 L.Ed. 820, 33 S.Ct. 449.

> WITNESS (GOULD): At that time, I'm sure, if he had asked me about any emotional problems, psychological problems, I would have said I had an emotional upset when my wife deserted me and was quite distraught about losing my family.

At this point, Mr. Doherty, defendant's counsel, harkens back into history to make a loaded comment reminiscent in form and in content of the classic example of the loaded question used by Lockewood and defined as a question which is unfair since it conveys information but cannot be appropriately responded to by the witness.[7] At. App. 74 by Mr. Doherty:

> Q. The police came in and picked you up because you were beating your wife. It was the neighbors who called the police and not she? Wasn't that around the 3rd of June, 1963?

In addition to other reasons, this is objectionable because it is comment, not question; it introduced the arrest of the plaintiff[8] highly prejudicial and improper information; it is in the form of unsworn testimony by counsel;[9] it is objectionable hearsay of the most blatant kind; it interjects totally irrelevant and wholly immaterial matter probative of no fact at issue in the case calculated to prejudice the plaintiff. It might be added that plaintiff was never

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[7]Wigmore on Evidence, Section 780. Footnote 1. The following anecdote neatly illustrates this trick of a "loaded" or forked question: "Sir Frank Lockewood was once engaged in a case in which Sir Charles Russell (the late lord Chief Justice of England) was opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, "yes" or "no". "You can answer any question yes or no," declared Sir Charles. "Oh, can you?" retorted Lockewood; "May I ask if you have left off beating your wife?" (Green Bag, vol. XII, p. 671)

[8]*Snead v. United States,* (C.A. 4, Va.) 217 F.2d 912.

[9]*Donnelly v. United States,* supra.

convicted of beating his wife or of any crime.

The poison, injected with suddenness was administered in massive doses by Mr. Doherty who next accused the plaintiff of attempting to murder his wife.

> Q. Didn't you try to choke her to death at that time?
>
> A. No.
>
> Q. Hadn't you tried to do that on various occasions?
>
> A. My god, no.

Again at App. 76 further hearsay is introduced by the defendant in a declaratory sentence, which was, like so many others, a rhetorical question. No answer was required as Mr. Doherty was satisfied with the prejudice wrought by his own statement.[10]

> Q. And you had a hearing in the police court in Fairfax County and you were sent someplace for the purpose of being checked to see your situation was mentally and physically. . .?

This line continued at App. 77:

> After you had the hearing in Fairfax, you went to the hospital. You were sent to a hospital? The Western State Assylum in Stanton (sic) Virginia.[11]
>
> A. Yes, I was committed to the hospital on my wife's testimony.
>
> Q. Wasn't there a neurosurgeon there and a psychiatrist that testified at the time?

---

[10] *Donnelly v. United States*, supra.

[11] Conclusions or opinions of administrative agencies or boards reflecting directly or indirectly their ultimate findings are generally inadmissible as hearsay and opinion evidence. *Universal Airline v. Eastern Air Line*, 188 F.2d 993, 88 U.S. App. D.C. 219.

Another sally into prejudicial and classic hearsay. What is done at any hearing proves nothing since the probable cause necessary to send someone for a short period of mental observation bears no relationship to proof necessary in this case. Even if there was clear and graphic testimony as to a pre-existing emotional or physical condition testified to by a neurosurgeon or a psychiatrist at that hearing, such evidence would not be admissible in this case unless there was an opportunity to cross-examine. We have no indication whether there was such testimony, what the nature of it was and whether it would be competent or probative of any issue in the case. It provided one more opportunity for Mr. Doherty to heap calumnies on the head of the plaintiff in such a continuing onslaught that it was incumbent upon the court sua sponte not to wait for objections before suppressing such conduct. Jones on Evidence, Section 930, page 1748.

Again the commentary of Mr. Doherty:

> Q. You are complaining now that you didn't have the constitutional rights, is that what it is? I don't know much about criminal law.

Mr. Doherty's knowledge or lack of knowledge about criminal law was probative of no issue in the case but did succeed in interjecting the word "criminal" into the proceedings.

Thereafter followed a speculative attempt at mind-reading which would have made Dunninger, Jean Dixon and all other clairvoyants look to their laurels.

> Q. Wasn't it just practically your statement to the court in the presence of the psychiatrist that they sent you away for observation because of the way you acted?
>
> A. Why they sent me there was, as far as I'm concerned, is on the testimony of my wife.

> Q. In your own statements—you testified did you not, at the time?
>
> A. Yes, I answered their questions.
>
> Q. It was rather evident that you were emotionally upset and depressed in various ways and attempted to harm her physically.

Again a loaded statement evoking a response but not capable of an answer. This constituted a categorical diagnosis by a non-physician, Mr. Doherty, who again brought into the proceeding an accusation that the plaintiff attempted to harm his wife physically. At App. 69 after a categorical denial that the plaintiff had any seizures of any kind like epilepsy and with no evidence to indicate that he had epilepsy previously but with intention of connecting a prior emotional upset to an epileptic seizure, counsel asked:

> Do you remember in Houston of having had such a situation of rolling on the floor with saliva coming out of your mouth? . . . Wasn't it some time after that you had two or three seizures going through this emotional problem of rolling on the floor with saliva coming out of your mouth?

Again, the loaded statement equating the emotion of a domestic argument with epileptic seizures, referring to them as such without any information or evidence of substantiation.

Thereafter Defendant delved into the wholly irrelevant area of Gould's divorce and remarriage and the reading of a police report insinuating that information was given by Plaintiff who claimed he was unconscious after being hit, before being brought to the hospital.

II

The entire testimony of the wife is a reprise of the objectionable cross-examination of the Plaintiff.

At page (GW-4) when Defendant's counsel sought to delve into the marital troubles of the Plaintiff, there was objection by the Plaintiff's counsel. The testimony was as follows:

> Q. Prior to the time you came to Washington were you having any marital troubles? (App. 109)
>
> A. Yes.
>
> MR. COYNE: I object to that, sir.
>
> MR. DOHERTY: I will get to it. I have made statements so far as to the emotional problems.
>
> MR. COYNE: The evidence has been that the emotional problems or marital problems have nothing to do with the injuries. I think there should be some medical evidence to show that this is relative to the case.
>
> THE COURT: The objection is overruled.

Thereafter there was a colloquy concerning the Defendant's reasons for the use of the wife as a witness. During this colloquy Plaintiff objected because there was no foundation for her testimony connecting the pre-accident emotional trouble and the head injuries.

The Court ruled in favor of permitting testimony but did so on assurance from Defendant's counsel. The key part of the colloquy was as follows:

> MR. DOHERTY: I asked certain questions and there was no objection at the time. I brought this lady here under subpoena for the purpose of giving her side of the story. We went into the marital differences pretty well on the direct and cross-examination of Mr. Gould. What I want to bring out is what I tried to bring out all along, and it is the emotional problems Mr. Gould had at all times.
>
> THE COURT: Causation has a lot to do with it.

MR. COYNE: But Mr. Doherty is arguing emotional causation and the doctors have testified that it has no relation to the case.

MR. DOHERTY: The doctors have no knowledge of anything that went on before.

MR. COYNE: The doctors knew what went on before the case. They testified that each, assuming there were emotional problems, they had nothing to do with the case.

MR. DOHERTY: The testimony I am going to put on doesn't need any doctors, the testimony I expect to get from this witness.

THE COURT: With that assurance on your part, I will let you proceed to a certain extent.

Despite this assurance the testimony soon sought information of the emotional state of the Plaintiff which required a conclusion by the witness of a medical nature to connect it to the issue.[12]

Q. Between that time and the birth of the child, can you tell the court and the jury the mental condition or emotional condition and what happened between you and Mr. Gould? (App. 112)

MR. COYNE: I object to that question. That calls for a conclusion on the part of the witness and medical opinion. Emotional state is a conclusion.

THE COURT: I will overrule that.

THE WITNESS: Before we were married and after the marriage it was miserable. Before we got married we had trouble, even until past the time we came here. I don't know exactly what you want to know.

---

[12]Evidence not full and complete within itself must appear to form a link in the chain. *St. Joe Paper Co. v. United States,* 155 F.2d 93, C.C.A. Fla. 1946.

MR. COYNE: I object to that. She isn't responding to the question. She said we had trouble.

Thereafter at App. 114 the objectionable testimony continued. Then the Defendant's counsel, who had used the word threat on three prior occasions in leading questions of this witness at App. 113, began to do so again. (App. 115)

Q. During this period of time was he threatening you?

A. Yes, sir. Absolutely. He threatened me, my neighbors, friends and co-workers.

MR. COYNE: I object. We are trying a case where a man is injured by a board.

MR. DOHERTY: If your honor please, the doctors who have testified on his behalf never found anything physically in their examinations. All they have is the electroencephalogram. I want to show what the condition was prior to the accident.

THE COURT: I will overrule the objection.

With another leading question began a demand by Mr. Doherty to the former wife to tell "as much as you can."

Q. From that time on will you tell the court and the jury about your existence and whether there was any physical beating?

A. Yes, sir.

MR. COYNE: What does that prove? That has no probative value. This man was injured by a board.

THE COURT: The objection is overruled.

BY MR. DOHERTY:

Q. Will you please tell us, in your own words, just as much as you can?

A. He did hit me, and at one time got me around the neck. I went to work with marks. Things like that.

There followed other questions asking for judgment of the Plaintiff's emotional state. (App. 118)

Q. Can you give us further, in your own words, sort of a report as to the emotional situation that he was going through at that time?

MR. COYNE: Same objection. She is not a professional witness.

THE COURT: Overruled.

BY MR. DOHERTY:

Q. What was the emotional situation a couple of years prior to the incident of May, 1964?

Then continued the interrogation along this line. The entire pattern was replete with irrelevancy unconnected to the issues and calculated to prejudice the Plaintiff. The allowance of such evidence to go to the jury reflected itself in a verdict lower than the special damages of the Plaintiff.

III

There are numerous holdings that instructions must be read as a whole.[13] However, after the jury foreman's note was read, the response of the Court, to that and additional questions, was brief and fragmentary (App. 129). Further, the question last addressed to the Court betrayed total failure by the jury foreman to understand how to proceed. "What do we have to prove for the plaintiff?"

The response of the Court could have been misinterpreted by the Court. The question is equivocal—Did the foreman mean, as the

[13] *Danzansky v. Zimbalist*, 105 F.2d 457, 70 App. D.C. 234; *Columbia Lumber v. Agoshio*, 184 F.2d 731, 13 Alaska 34.

Court's response would seem to indicate, What do we have to prove to find for the plaintiff? or as seems more likely since the Court had, by its response to the note initiating the reinstructions, already answered the question, The elements of proof, what do we have to prove for the plaintiff?

If the question was interpreted by counsel for plaintiff as the Court did, no objection would be appropriate; however, if the jury concerned itself with the damages, the last instruction was totally inadequate.

This instruction must be looked upon as separated from all the other instructions because of the jury's manifest quandary. As the last instruction given, separated from the others and giving a composite summary, it was not cured by other instructions since the state of minds of the jurors might by virtue of the circumstances and time of this instruction eliminate from consideration prior conflicting instructions. Misleading instructions require a new trial.

CONCLUSION

In view of the violations of the rules of evidence in cross-examination and in permitting extensive prejudicial testimony from wife and in the inadequate instructions the appellant respectfully requests vacation of the judgment for damages entered and a new trial on the issue of damages.

Respectfully,

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UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 22,655

GEORGE W. GOULD, JR.

Appellant

vs.

A B C DEMOLITION CORPORATION

Appellee

Appeal From the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

In the opinion of the appellee there is but one issue and that is what is the scope of appellate review of an order denying a motion for a new trial based solely on the grounds of an inadequate verdict. If the Court is of the opinion that the full record comes under review, the following supplemental issues appear.

* This case has not previously been before this Court under the same or similar title.

2. Is it permissible on cross-examination to bring out evidence to contradict, modify or explain the testimony given by a witness on his direct examination?

3. May a party advance for the first time on appeal alleged errors in the admission of evidence when he voiced no objection during the trial nor urged these alleged errors in support of a motion for a new trial?

4. Must objections to instructions by the Court to the jury be made before the jury retires in order for this Court to consider alleged errors in the giving of instructions?

COUNTER-STATEMENT OF THE CASE

The plaintiff testified that while standing with a friend on the northwest corner of Twelfth Street and Pennsylvania Avenue, N. W., Washington, D. C., waiting for a traffic light, his friend called out "watch-out"; whereupon he and his friend began to run west on Pennsylvania Avenue (J.A. 29). After he ran several paces he blacked out (J. A. 30). Thereafter, he was hospitalized from May 4, 1964, to May 30, 1964, and treated for a bruise and sprain to his left shoulder, cramp in the left leg, shooting pains in the small of his back and hips, dizziness, nausea, headaches, black-outs, "light in his eyes" and for tre atment for a laceration to his

scalp (App. 31, 32).

He testified that prior to May 4, 1964, he had never had a head injury, never had a headache, and never had a convulsive disorder (App. 37). He further testified that he missed approximately seven hundred fifty (750) hours from work at a loss to him of $2500.00 (J. A. 41).

Physicians called by the plaintiff testified that the plaintiff sustained damage to the brain resulting in his convulsive disorder requiring the plaintiff to take dilantin, an anti-convulsant, for the rest of his life.

On cross-examination, the plaintiff reiterated that he was in good health prior to the accident, never had difficulties of any kind. Later he admitted that light bothered his eyes and that he wore dark glasses prior to the accident.

Further inquiry concerned complaints of discomfort and pain that he made while in the hospital. (J. A. 55, 63). The plaintiff testified that he saw Dr. Moyle and Dr. Murphy, both of whom are neuro-surgeons, and these physicians were later called to testify on his behalf (J. A. 64, 66).

There was no testimony by anyone, other than the plaintiff, of any physical injury to him, except a laceration of the scalp.

Counsel for the defendant had, prior to trial, been furnished with copies of the medical reports of all the physicians, as well as copies of the hospital records, and, therefore, knew what these physicians would testify to concerning their examinations of the plaintiff as well as their opinions. Accordingly, the plaintiff was cross-examined about his referral to these doctors and whether or not he sought them for bonified medical treatment or went to them solely on the advice and at the request of his attorney.

He was further cross-examined about the extent of the history that he gave these doctors concerning his physical, mental and emotional condition prior to the accident since one of the chief elements used by a physician in arriving at an opinion as to causal relationship, particularly in the absence of any objective physical finding, is the history given him by the patient.

The cross-examination continued with an inquiry about the plaintiff's emotional and psychological problems with his former wife prior to and immediately after the accident and also about his commitment for observation at a mental hospital less than a year prior to this accident. During the course of this aspect of the cross-examination, counsel for the plaintiff voiced only one objection and that was on the grounds that the cross-examination was "going too far afield." Whereupon, the objection was sustained and no further inquiry was

made about this matter (J. A. 84).

The following day cross-examination continued regarding the plaintiff's alleged seven hundred fifty (750) hours that he was unable to work, as well as statements signed by him on November 2, 1966, almost two and one-half years subsequent to the accident, in which he responded on an application for a driver's permit, that at that time he did not have any physical or mental disabilities which would affect his driving (J. A. 94, 95).

On redirect examination plaintiff was permitted to testify that he was physically examined on several occasions prior to the accident and passed them all; the most recent one prior to the accident being an employment physical in 1961 (J. A. 101, 104). The purpose of this testimony was to show the absence of any physical or mental difficulties prior to the accident and leave with the jury the inference that the plaintiff's present difficulties, if any, were solely caused by the accident.

The defendant vigorously contested both liability and damages and called witnesses with respect to both issues. On the issue of damages the nature and extent of the plaintiff's injuries and prior condition were inquired into and the defendant not only called Dr. John Gallagher, who examined the plaintiff at the request of the defendant, but also called the plaintiff's former wife to corroborate

what had been inquired into without any objection during the cross-examination of the plaintiff. The plaintiff had on cross-examination, and previous to the testimony of his former wife, denied that he had had any emotional and psychiatric problems prior to the accident and denied that he had ever physically threatened his former wife and made light of two incidents in which he lost physical control of himself to the extent that he slumped to the floor, beat his fists on the floor and emitted saliva from the mouth. He portrayed his commitment for mental observation one year prior to this accident as a vindictive act by his wife.

The jury was fully instructed on the law, without objection by either party to the charge. A verdict was returned in favor of the plaintiff in the sum of $1627.10.

Thereafter, a motion for a new trial was filed solely on the grounds of inadequate verdict (J. A. 11). No assignment of any error during the course of the trial was ever urged in this motion. Upon consideration of the motion and the opposition thereto, the Court denied the motion for a new trial setting forth its reasons in a memorandum opinion (J. A. 21 and 22).

The plaintiff filed a notice of appeal on July 24, 1968, from the judgment (sic) of the Court dated June 26, 1968, denying his motion for a new trial (J. A. 23).

ARGUMENT

I. The Granting or Denying of a Motion for a New trial rests within the Sound Discretion of the Trial Court and an Appellate Court Will not Review that Rule Unless an Abuse of Discretion on the Part of the Trial Court has been Shown

It is well established that the trial Court's ruling on a motion for a new trial rests in its sole discretion and that an appellate Court will not review that ruling in the absence of showing of an abuse of discretion. Fairmont Glass Works v. Cub Fork Co., 1933, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439; Bryant v. Mathis, 1960, 107 U. S. App. D. C. 339, 278 F. (2d) 19; Rankin v. Shayne Bros., Inc., 1956, 98 U. S. App. D. C. 214, 234 F. (2d) 35; Frasca v. Howell, 1950, 87 U. S. App. D. C. 52, 182 F. (2d) 703.

"Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its findings on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a . . . new trial. . ." Taylor v. Washington Terminal Company, U. S. Court of Appeals for the District of Columbia, slip opinion, February 20, 1969.

On June 4, 1968, the jury returned a verdict in favor of the plaintiff. Thereafter the plaintiff filed a motion for a new trial on the sole ground that the verdict was inadequate. No other reason was assigned nor urged in support of the motion. The trial

Court denied this motion on June 26, 1968. On July 24, 1968, the plaintiff filed a notice of appeal from the judgment (sic) of the Court dated June 26, 1968. This latter date was the date on which the Court entered an order denying the plaintiff's motion for a new trial. The plaintiff has not appealed from the judgment which had been entered prior thereto. Accordingly, it necessarily follows that the only matter before this Court is did the trial Court abuse its discretion in denying a new trial on the grounds of an inadequate verdict. The plaintiff, however, in his brief urges reversal on the grounds that the cross-examination of the plaintiff was prejudicial; that the direct testimony of the former wife of the plaintiff was prejudicial and that the supplemental instructions to the jury were inadequate. Since these matters were not raised in the trial Court and not preserved by appropriate objection, the plaintiff cannot now raise them at this late date.

This Court recently said in Miller v. Aviron, 1967, 127 U. S. App. D. C. 367, 384 F. (2d) 319:

> "In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort . . ."

And further:

> ". . . judicial action sought on one ground at trial does not suffice to enable a party to invoke another on appeal." 369 and 370.

With respect to the only issue directly before this Court, and that is did the trial Court abuse its discretion in denying a new trial on the ground of inadequate damages, Judge Fahy, speaking for the Court in Rankin v. Shayne Brothers, Inc., supra, set forth the general rule that this Court of Appeals, like Courts in general, is reluctant to set aside a jury award for personal injuries even though the verdict created some "wonderment" or may possibly be the result of compromise or of a mistake. "Verdicts cannot be upset by speculation or inquiry into such matters."

The same result for the same reasons was reached in Bryant v. Mathis, supra, which was a suit by an automobile passenger for damages for injuries. The plaintiff passenger claimed that she incurred medical bills for injuries received in an automobile accident in the sum of $3407.32, and lost wages as a result of the same injuries in the sum of $4500.00, thus incurring total special damages of $7907.32. The jury returned a verdict in her favor in the sum of $4250.00.

The plaintiff in that case appealed the denial of her motion for a new trial. This Court affirmed the trial Court stating that motions for a new trial are committed to the trial Court's discretion.

In the instant case, as the trial Court found, the

jury award, although unsatisfactory to the plaintiff, was nonetheless sufficient to cover his hospital bills, doctors' bills for services rendered in the hospital and $844.00 in addition. It is quite evident that the jury simply did not believe all the complaints the plaintiff alleged were caused as a result of any injuries received in this accident; particularly when the only objective finding of injury was a laceration to the scalp.

II The nature and Extent of Cross-Examination Rests in the Sole Discretion of the Trial Judge and the Admission of Testimony not Objected to During the Course of the Trial May not be Urged as Grounds for a Reversal in the Appeals Court

Although it was never raised in the trial Court, the plaintiff now asserts that the cross-examination of him was so improper that he should be awarded a new trial.

Professor Wigmore writes that cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth. The Anglo-American system of Evidence has regarded the necessity of testing by cross-examination a vital feature of our system of law. 5 Wigmore Evidence (3rd Edition), Section 1367. Cross-examination is a cherished right and the nature and extent of it is committed to the sound discretion of the trial Court. Alford v. United States, 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624.

Great latitude should be allowed in the exercise of that discretion. Jones v. Schanck, 1957, 101 U. S. App. D. C. 336, 248 F. (2d) 658. Further, it is proper to bring out on cross-examination anything that tends to contradict, modify or explain the testimony given by a witness on his direct examination. Mintz v. Premier Cab Association, Inc., 1942, 75 App. D. C. 389, 127 F. (2d) 744. It may embrace any matter germane to direct examination by way of qualifying it or destroying it or tending to develope matters which have been suppressed or ignored by the witness. Sleek v. J. C. Penny Company, 324 F. (2d) 467, 1963.

In the present case the plaintiff alleged that as a result of being struck on the head he sustained permanent damage, resulting in convulsive disorders that can only be controlled by medication. He described a series of symptoms from headaches to myopia following his injury and denied the existence of these symptoms or of any physical or mental difficulties prior to the accident. Based upon a negative prior history, the only logical inference to be drawn, if the jury believed his present complaints, was that the complaints and present condition were the result of the injury complained of. when this is substantiated by medical testimony presented by him. Most certainly, however, a physical, mental and emotionally well person does not fall to the floor, beat his fists on the floor and discharge

saliva. Such conduct certainly manifests a severe illness, be it emotional, psychological or physical.

It is well within the realm of proper cross-examination to bring this pre-existing condition to the attention of the jury to contradict or impeach the plaintiff's allegations of permanent injury in the nature of traumatic epilepsy caused as a result of this accident. His past actions were very similar to the symptoms of a convulsive disorder. Further, it was very material that these conditions manifest itself one year prior to the instant accident and were of such severity and accompanied by threats to the life and physical well-being of his former wife that he was committed to a hospital for tests and observation after a hearing before a Court of competent jurisdiction. This testimony certainly was germane to his direct examination and not only developed facts which he suppressed from his own examining physicians which necessarily would lessen the weight of their opinions in the minds of the jury but directly contradicted his testimony on direct examination.

Further, no one ever inferred that the plaintiff was convicted of any crime. The plaintiff himself used the term "arrest" in response to a question regarding physical attacks on his former wife, and, further, he was the one who suggested that the hearing preceding his committment was in violation of his legal rights in that

he was denied counsel.

The fact remains that less than one year prior to this accident the plaintiff's conduct was such that it was necessary to have a hearing to determine whether his actions were such that it would be in his own interests and welfare that he should undergo a period of medical observation. Certainly this had a very material bearing on the issue of the physical, mental and emotional state of the plaintiff prior to this accident.

In addition, counsel for the plaintiff never objected to this cross-examination and in the absence of such an objection it has not been properly raised and preserved for determination by this Court. Miller v. Aviron, supra; Richardson v. Richardson, 1940, 72 App. D. C. 67, 112 F. (2d) 19.

It is also urged that the use of the hospital record during the course of cross-examination of the plaintiff was prejudicial and, therefore, error. The pre-trial order of the Court provided that the parties stipulated to the admission in evidence of the hospital records, subject to all legal objections. Again, there was no objection raised by the plaintiff in the trial Court with respect to the use of the records. At the stage about which the plaintiff now complains, the defendant could not have offered the records in evidence since the plaintiff had not rested his case. It would be unwise, if not improper,

for a defendant to offer evidence before the plaintiff rested.

In addition, the records were not used as proof of the facts contained therein but were used solely for the purpose of testing the accuracy of the witnesses' memory. They did not render his testimony on direct examination nugatory. The portions of the record used were expressions of fact not complicated medical opinions.

Taylor v. New York Life, 1944, 79 U. S. App. D.C. 66, 147 F. (2d) 297, relied upon by the plaintiff, is wholly inapposite. In that case the plaintiff offered the medical records which contained expressions of opinion as proof of those facts, and the Court quite properly held that the portions of those records sought to be used were hearsay. The use of the medical records in this case did not violate the hearsay rule, even if an objection had been properly made at that time. Weaver v. Iranni, et al, D. C. C. A. 1966, 222 Atl. (2d) 864.

III Alleged Insufficiency in Supplemental Instructions to the Jury may not be Considered on Appeal Where there was no timely Objection to the Charge as Given

Rule 51 of the Federal Rules of Civil Procedure provides, in part, " . . .No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter

to which he objects and the grounds of his objection . . ." The language of the rule is clear and unequivocal. On prior occasions this Court has stated that where an appellant has failed to afford the trial Court the opportunity of considering objections to a supplemental charge at any time before the jury left the room, the Court of Appeals was precluded by Rule 51 from considering such objections. Fleming v. Ayoub, 1963, 114 U. S. App. D. C. 301, 315 F. (2d) 47; Joyner v. George Washington University, 1957, 100 U. S. App. D. C. 64, 242 F. (2d) 37; Capital Transit Company v. Howard, 1952, 90 U. S. App. D. C. 359, 196 F. (2d) 593; Ersler v. T. F. Schneider Corporation, 1951, 88 U. S. App. D. C. 371, 188 F. (2d) 1022; Crockett Engineering Company v. Ehret Magnesia Mfg. Co., 1946, 81 U. S. App. D. C. 159, 156 F. (2d) 817.

The plaintiff, having failed to preserve this alleged error by timely objection, is precluded from raising it at this time.

CONCLUSION

It is respectfully submitted that the sole issue before this Court concerns the trial Court's discretion in denying the plaintiff a new trial, and it is respectfully urged that the trial Court did not abuse its discretion.

Further, if this Court is of the opinion that it may

consider the other matters raised by the plaintiff, then it is respectfully urged that the trial Court did not abuse its discretion with respect to the nature of the cross-examination of the plaintiff; that the plaintiff failed to preserve for review any alleged errors by his failure to object and failed to preserve for review any alleged errors in the supplemental instructions to the jury by his failure to note a timely objection, and, therefore, the order of the trial Court should be affirmed.

Respectfully Submitted,

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